a plaintiff suing his own agent and, in the present case, in doing so against a possible joint agent the plaintiff not only adopted the quickest and most convenient way of effecting service, but the cheapest. Civil Suit No. 350 of 1958 is clearly an action relating to a business. Ramasamy Chettiar is admittedly the agent of the defendants having control or management of the business at the time of service and the defendants are out of the jurisdiction. All the requirements therefore of rule 8A for service as effected by the plaintiff are here present and I accordingly held that such service was in order under Order IX rule 8A. I am of opinion that the words "any business" used in this Rule can only be construed as including a partnership business.

Motion dismissed.

Solicitors : *Shearn, Delamore & Co.*; *Braddell & Ramani.*

MAT SAWI BIN BAHODIN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Syed Sheh Barakbah JJ.) January 6, 1958]

[K.L. — F.M. Criminal Appeal No. 4 of 1957]

Criminal Law and Procedure — Provocation — Defence of grave and sudden provocation — Domestic unhappiness — Long standing suspicion of fidelity aggravated by pain — Whether killing amounted to murder or culpable homicide — Misdirection — Penal Code, ss. 300 and 304.

The appellant was convicted and sentenced to death for the murder of his mother-in-law. The question on appeal related to the circumstances in which he killed her. At the trial the different versions of what lead up to the killing showed that there was a long history of domestic troubles and of his suspicions as to his wife's fidelity aggravated by the attitude of the deceased's siding with her daughter. The versions diverge when it came to the night of the killing.

His wife said that on the night in question the appellant complained of pains in his stomach for which she proceeded to massage him. While she was so doing, her mother used very abusive words and an argument arose. So far as she was concerned that was the end of the affair for she was for some reason attacked by the appellant and woke up next morning in Hospital. The appellant in his confession said that his wife, without looking at him, rubbed some oil over his abdomen. He spoke to her but she did not reply. He then spoke to his mother-in-law and drew her attention to her daughter's behaviour and reminded her that this was all due to her allowing his wife to go to work. The deceased began to scold him and accused him of treating her daughter in a rough way. The appellant replied that he was speaking to his wife in a gentle way. He then said: "When my mother-in-law came forward towards me scolding me I picked up a knife which was in the room — the knife used for cutting fowls. When my mother-in-law came towards me scolding me I stabbed my mother-in-law." Then at the trial he described the quarrel during the night and said that as a result his wife had tried to commit suicide and that the dead woman somehow or other received the injuries which proved fatal to her while trying to take the knife away from her daughter.

In his summing-up the learned trial Judge said *inter alia*: "I must tell you that in order to set up the defence of grave and sudden provocation it has to be shown that the provocation was grave, that it was sudden, and that it was such provocation as would cause a reasonable man to lose his self-control. There is only one point in this connection about which I would like to tell you, and that is about the question of suddenness. The only provocation here was a suspicion in the mind of the accused that his wife was unfaithful to him while she was working first on one estate and then on another, and that the deceased was responsible for her going to this work. That suspicion had arisen some time ago and there was no suddenness about it. Therefore in this case the defence of grave and sudden provocation does not arise."

Held: (1) it was not open to the Court of Appeal to decide where, if at all, the truth lay in those stories; neither was it a matter for the trial Judge to decide, though he was entitled to express any opinion he might hold on the point;

(2) the trial Judge had to decide whether or not he should direct the jury that it was open to them if they were not satisfied that murder was made out to find the accused guilty of some lesser offence;

(3) the portion of the summing-up which had been quoted was a misdirection. If what the appellant said at the trial was true he was not guilty of any offence, but if that evidence was rejected he was at the very lowest entitled to have what he had done considered in the light of his confession, and on that there was evidence on which it was open to the jury to find that the killing was not murder but culpable homicide not amounting to murder;

(4) in this case there was sufficient evidence to make the question a question of fact for the jury and not a question of law for the Judge and the appellant had therefore suffered to the extent of having the question adjudicated by the Judge when it should have been adjudicated upon by the jury;

(5) the conviction for murder could not stand and must be quashed. Following *Chan Kau v. R.*(2) the conviction for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code substituted.

Cases referred to:—

(1) *Holmes v. Director of Public Prosecutions,* (1946) A.C. 588.

(2) *Chan Kau v. R.,* (1955) A.C. 206; (1955) 1 All E.R. 266.

The following cases were also cited in argument: *Bullard v. R.,* (1957) A.C. 635; *R. v. Simpson,* (1957) Crim. L.R. 815.

COURT OF APPEAL.

C. S. Jayaswal for the appellant.

Bahaudin bin Mohd. Yacob (Federal counsel) for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by —

Thomson C.J.: — In this case the appellant was tried at the Malacca Assizes for the murder of his mother-in-law Karimah at Kampong Tedong Merlimau in the Jasin District on 28th August, 1957. He was convicted and sentenced to death. Against that conviction he has now appealed.

On the evidence there was not and is not the slightest room for doubt that the appellant killed his mother-in-law. The only question before us in this appeal relates to the circumstances in which he killed her. At the trial there were three different versions of what lead up to the killing. There was the evidence of the dead woman's daughter who was herself attacked and whose account stopped short of the actual killing. Then there was the version given by the appellant in a confession which he made to the Malacca Magistrate a day or two after the incident. And finally there was the version given by the appellant himself in evidence at his trial.

These three versions have one thing in common. All three go to show that there was a long history of domestic unhappiness on the part of the appellant and his wife which had probably been aggravated by the attitude of the dead woman in siding with her daughter. It is clear that for some considerable time the appellant had taken exception to his wife going out to work and that the mother-in-law had supported her daughter against him. There was also evidence to show that the basis of his objecting to his wife going out to work was that rightly or wrongly he was of the opinion that it conduced to her forming unsatisfactory relationships with other men. Whatever be the truth, all three versions of the events prior to the killing have this background in common.

When it comes, however, to the night of the killing the three versions diverge.

First of all there is the version given by his wife. She said that on the night in question the appellant woke up complaining of pains in his stomach for which she proceeded to massage him. While she was doing so her mother used very abusive words towards the appellant including the expression "babi". An argument arose and that so far as she was concerned was the end of the affair for, although she did not say so, she was for some reason attacked by the appellant and woke up next morning in Hospital.

Then we have the version given by the appellant in his confession. He tells the story of previous domestic troubles and of his suspicions as to his wife's fidelity. Then he comes to the night of the material events:

> "About 7 p.m. I had stomach-ache. Up to 2 a.m. I had been continuously waking my wife up telling her that I was having stomach-ache. She got up sometime after 2 a.m. — and rubbed some oil over my abdomen, without looking at me. Her face was turned the other way. I asked her why she was not looking at me. I asked her if she did not like me or not. I asked her this gently but she gave no answer. I told her that since she is not even looking at my face I was sure her heart was with someone else. I told her 'Don't you love the small children? How can you love someone else?' She did not reply. Then I spoke to my mother-in-law Karimah. I drew her attention to the behaviour of her daughter. I reminded her this was all due to my mother-in-law allowing my wife to go to work. Karimah began to scold me and accused me of treating her daughter in a rough way. I told my mother-in-law that I was speaking to my wife only in a gentle way. When my mother-in-law came forward towards me scolding me I picked up a knife which was in the room — the knife used for cutting fowls. When my mother-in-law came towards me scolding me I stabbed my mother-in-law."

Then at the trial the prisoner told a story that to put it mildly was somewhat difficult to believe. He described the quarrel during the night and said that as a result his wife had tried to commit suicide and that the dead woman somehow or other received the injuries which proved fatal to her while trying to take the knife away from her daughter.

It is not for us as a Court of Appeal to decide where, if at all, the truth lies in these stories. Neither, with respect, was it a matter for the trial Judge to decide, though of course he was entitled to express any opinion he might hold on the point.

What the Judge did have to decide was whether or not he should direct the jury that it was open to them if they were not satisfied that murder was made out to find the accused guilty of some lesser offence. At the commencement of his summing-up, which was otherwise impeccable, he dealt with the matter as follows:—

> "I must tell you that in order to set up the defence of grave and sudden provocation it has to be shown that the provocation was grave, that it was sudden, and that it was such provocation as would cause a reasonable man

to lose his self-control. There is only one point in this connection about which I would like to tell you, and that is about the question of suddenness. The only provocation here was a suspicion in the mind of the accused that his wife was unfaithful to him while she was working first on one estate and then on another, and that the deceased was responsible for her going to this work. That suspicion had arisen some time ago and there was no suddenness about it. Therefore in this case the defence of grave and sudden provocation does not arise."

He then went on to discuss the case on the basis that it was a case of murder or nothing and very properly pointed out that the jury would be very largely influenced by the view they took as to the truth of the confession made by the accused, for that was the most important piece of evidence on which the prosecution relied to show that it was the accused that killed the dead woman.

In our opinion the portion of the summing-up which has been quoted was a misdirection. The question is dealt with in the case of *Holmes v. Director of Public Prosecutions*[1] in the following passage from the speech of Viscount Simon, L.C., at page 597:—

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the Judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

If what the appellant said at the trial was true he was of course not guilty of any offence, but if that evidence was rejected he was at the very lowest entitled to have what he had done considered in the light of his confession which after all, was part of the prosecution case against him. And on that we are unable to agree that that as a matter of law there was no evidence on which it was open to the jury to find that the killing was not murder but culpable homicide not amounting to murder. To put it slightly differently we are not satisfied that the view could not (as distinct from would not) fairly have been taken that the offence was not murder but culpable homicide. As we see it the provocation of which there was evidence, if it was believed, was not "only.....a suspicion in the mind of the accused that his wife was unfaithful to him.....and that the deceased was responsible," about which of course there was no question of suddenness. There was evidence that the provocation was that the dead woman whom he regarded as partly responsible for his domestic trouble came towards him scolding him at a time when he was in pain and his wife's coldness in dealing with his pain had revived all his long-standing suspicions.

We do not say for one moment that had the issue of culpable homicide been left to the jury they would have decided it in favour of the appellant. Nevertheless in our view there was sufficient evidence to make the question a question of fact for the jury and not a question of law for the Judge and the appellant has therefore suffered to the extent of having the question adjudicated by the Judge when it should have been adjudicated upon by the jury.

In the circumstances the conviction for murder cannot stand and must be quashed. After consideration we have decided to follow the course taken in the case of *Chan Kau v. The Queen*[2] and not send the matter back for retrial but substitute for the conviction for murder a conviction for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code and impose a sentence of ten years' imprisonment.

Order accordingly.

Solicitors: *Jayaswal & Koh.*

TAN HONG KWEE v. KOH SWEE KOK

[O.C.J. (Chua J.) December 24, 1957]

[Singapore — Suit No. 314 of 1957]

Damages — Fatal accident — Civil Law Ordinance (Cap.24), s.12 — Basis of assessment of loss of income.

In considering a claim for damages under section 12 of the Civil Law Ordinance, the Court has, in the best way it can, to find a sum of money which it thinks will fairly compensate the family of the deceased.

Cases referred to:—

(1) *Benham v. Gambling*, (1941) A.C. 157.

(2) *Heatley & Anor. v. Steel Co. of Wales Ltd.*, (1953) 1 All E.R. 489; (1953) 1 W.L.R. 405.